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COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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The State of Texas,
Appellant

v.

Jose Ruiz
Appellee

From the Court of Appeals for the
Thirteenth Judicial District at Corpus Christi

13-13-00507-CR

APPELLEE'S REPLY BRIEF

On Appeal from the 25th Judicial District Court, Gonzales County, Texas
The Honorable William D. Old III., Judge Presiding

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MISCELLANEOUS

STATEMENT REGARDING ORAL ARGUMENT

Appellee does not request oral argument, as oral argument would not significantly aid the court in deciding this issue.

STATEMENT OF THE CASE

Jose Ruiz was indicted for driving while intoxicated, third or more.(Cl.R.vol.1 of 1,at 3-4).Ruiz filed a motion to suppress the results of his blood test based on *Missouri v.McNeely*,133S.Ct.1552 (2013).(Ct.R.Vol.1 of 1 at 4-23). The trial court granted the motion, and the State appealed. (Cl. R. Vol. 1 of 1, at 16-18).

PROCEDURAL HISTORY

The court of appeals held in its original opinion that neither implied consent nor exigent circumstances justified the unconscious blood draw. State v. Ruiz, 509 S.W.3d 451 (Tex. App.—Corpus Christi 2015, pet. granted). In 2016, this Honorable Court granted the State's petition for discretionary review. After argument, the Court remanded the case for the court of appeals to consider exigent circumstances. State v. Ruiz, PD-1362-15, 2017 Tex. Crim. App. LEXIS 183, 2017 WL 430291 (Tex. Crim. App. Feb. 1, 2017)(not designated for publication). The court of appeals issued its opinion on remand on January 11, 2018. State v.

Ruiz, No. 13-13-00507-CR, 2018 Tex. App. LEXIS 302 (Tex. App.—Corpus Christi Jan. 11, 2018)(designated for publication). On April 25, 2018, this Honorable Court granted the first ground in the State's Petition for Discretionary Review.

Issue Presented

Is it unreasonable under the Fourth Amendment for an officer to rely on a driver's implied consent to a blood draw when the driver was involved in an accident, there is probable cause to believe he is intoxicated, and where the driver's own unconsciousness prevents the officer from effectively obtaining the driver's actual consent? Reframed, do sections 724.011(a) and 724.014(a) of the Texas Transportation Code constitute the equivalent of voluntary consent as a recognized exception to the warrant requirement, and did the state meet its burden to establish the reasonableness of drawing Ruiz's blood without a warrant pursuant to sections 724.011(a) and 724.014(a) of the transportation code?

STATEMENT OF THE FACTS

In September 2012, six months before the Supreme Court's April 2013 decision in Missouri v. McNeely, Sergeant Bethany McBride

responded to a two vehicle accident around midnight. (Ct. R. vol. 1 of 1, at 7). When Sergeant McBride arrived at the scene, she observed that a Lincoln Navigator had collided with a Pontiac. (Ct. R. vol. 1 of 1, at 7, 13). The driver of the Pontiac remained on the scene, but the driver of the Lincoln had fled. (Ct. R. vol. 1 of 1, at 7). As Sergeant McBride investigated the scene, two witnesses approached her and gave her a description of the driver of the Lincoln and stated that the driver had run behind a nearby carwash. (Ct. R. vol. 1 of 1, at 7). Sergeant

McBride looked in the Lincoln to determine the identity of the driver and located insurance paperwork that belonged to Ruiz. (Ct. R. vol. 1 of 1, at 7-8). Sergeant McBride also ran the license plate of the Lincoln which came back to Ruiz. (Ct. R. vol. 1 of 1, at 8). While inside the vehicle Sergeant McBride observed several Bud Light cans in the front seat area. (Ct. R. vol. 1 of 1, at 8).

After searching the area where the witnesses said the driver of the Lincoln had fled, officers were able to locate Ruiz in a field behind the car wash. (Ct. R. vol. 1 of 1, at 8-9). Ruiz was unresponsive, and had to be carried to the patrol unit. (Ct. R. vol. 1 of 1, at 9). Sergeant McBride observed the very strong odor of alcoholic beverages coming from Ruiz. (Ct. R. vol. 1 of 1, at

9-10). Sergeant McBride did not observe any injuries on Ruiz and determined that he was unresponsive due to the amount of alcohol in his system. (Ct. R. vol. 1 of 1, at 10-11).

EMS arrived on scene to treat Ruiz. (Ct. R. vol. 1 of 1, at 11). EMS performed several sternum rubs to try and get Ruiz to be responsive, but Ruiz never responded. (Ct. R. vol. 1 of 1, at 11). EMS also checked Ruiz's blood pressure and based on Ruiz's condition, EMS transported Ruiz to the hospital for treatment. (Ct. R. vol. 1 of 1, at 11).

Sergeant McBride went to the hospital and placed Ruiz under arrest for driving while intoxicated. (Ct. R. vol. 1 of 1, at 12). When Sergeant McBride ran Ruiz's criminal history, she discovered Ruiz had at least four convictions for driving while intoxicated. (Ct. R. vol. 1 of 1, at 17). Sergeant McBride prepared the necessary paperwork for a blood draw and a qualified lab technician with the hospital drew Ruiz's blood. (Ct. R. vol. 1 of 1, at 12). Ruiz remained unconscious the entire time. (Ct. R. vol. 1 of 1, at 12-13).

Sergeant McBride explained that it would have been impractical to secure a warrant because there was no magistrate

on call at that time and it would have been difficult to find one at that time on a weekend. (Ct. R. vol. 1 of 1, at 15, 18). Sergeant McBride also was one of only two officers on duty for the Gonzales Police Department at the time, and it would have been impracticable to remove one officer from duty to secure the warrant. (Ct. R. vol. 1 of 1, at 15). Sergeant McBride explained that at the time, there were no procedures in place to obtain a search warrant. (Cl. R. vol. 1 of 1, at 15, 18). If there had been, it still would have taken probably two to three hours to write the affidavit, drive to a magistrate's house (if she could find one), to obtain a signed warrant, and return to the hospital. (Ct. R. vol. 1 of 1, at 15, 18, 19).

Sergeant McBride explained that the investigation was prolonged in this case beyond a normal DWI because there was an accident that had to be investigated, Ruiz fled the scene, so she had to investigate who was likely driving and locate him, and because Ruiz was found unresponsive she had to secure his treatment by EMS. (Ct. R. vol. 1 of 1, at 17-20). Sergeant McBride knew that during this prolonged process the alcohol in Ruiz's bloodstream was dissipating. (Ct. R. vol. 1 of 1, at 19).

In the trial court, Ruiz moved to suppress his blood-test results under Missouri v. McNeely, 133 S. Ct. 1552 (2013). (Ct. R. vol. 1 of 1, at 4-5). Although the trial court found Sergeant McBride's testimony credible in all respects, the trial court concluded there were no exigent circumstances which justified the blood draw. (Cl. R. Supp. vol. 1 of 1, at 12)

SUMMARY OF THE ARGUMENT

It is unreasonable under the Fourth Amendment for an officer to rely on a driver's implied consent to a blood draw under the facts in the underlying case. Sections 724.011(a) and 724.014(a) of the Texas Transportation Code do not constitute the equivalent of voluntary consent as a recognized exception to the warrant requirement, and the state did not meet its burden to establish the reasonableness of drawing Ruiz's blood without a warrant pursuant to sections 724.011(a) and 724.014(a) of the transportation code.

ARGUMENT AND AUTHORITIES

Section 724.011(a) of the transportation code permits implied consent for an individual who has been arrested for driving while intoxicated. See id. § 724.011. § 724.013 provides that implied consent, may be revoked, absent certain exceptions. See id.

("Except as provided by Section 724.012(b), a specimen may not be taken if a person refuses to submit to the taking of a specimen designated by a peace officer. If a drunk-driving suspect refuses to submit to the taking of a specimen, officers must procure a warrant in order to take a blood draw. See id. However, if a drunk-driving suspect is "dead, unconscious, or otherwise incapable of refusal," implied consent is considered "not to have [been withdrawn] as provided by section 724.011." See id. § 724.014(a). This implied-consent-law framework "does not give officers the ability to forcibly obtain blood samples from anyone arrested for [driving while intoxicated]," but instead "gives officers the ability to present an affidavit to a magistrate in every DWI case, just like every other criminal offense." See Beeman v. State, 86 S.W.3d 613, 616 (Tex. Crim. App. 2002).

The crux of the state's argument is that implied-consent statutes establish that Ruiz effectively consented to the warrantless blood draw. The record is undisputed that Ruiz was unconscious and hospitalized during the course of Officer McBride's investigation on September 9, 2012. Specifically, the State is relying on section 724.014(a) to invoke the recognized consent exception to the warrant requirement. Appellee argues that the state's interpretation of the aforementioned implied consent statutes is overly ambitious, flawed, and overreaches.

Before the state can rely upon consent to justify the lawfulness of a search, it must prove that the consent was, in fact, freely and voluntarily given. Bumper v. North

Carolina, 391 U.S. 543, 546 (1968). Additionally, a person who consents to a search may also specifically limit or revoke such consent. Miller v. State, 393 S.W.3d 255, 266 (Tex. Crim. App. 2012); Valtierra v. State, 310 SW 3d 442, 450 (Tex. Crim. App. 2010). Whether consent was valid is a question of fact that the State must prove by clear and convincing evidence. Fienen v. State, 390 S.W.3d 328, 333 (Tex. Crim. App. 2012). The fact finder must consider the totality of the circumstances in determining whether consent was given voluntarily. Id. Thus, the State cannot meet its burden to establish that one consented if such consent was not given freely and voluntarily. See Bumper, 391 U.S. at 546.

In the instant case, the trial court found that Ruiz was unconscious and did not respond to Officer McBride. It is clear that based upon these facts, Ruiz was unable to give his consent freely and voluntarily, or have the opportunity to revoke such consent. See id.; see also Florida v. Jimeno, 500 U.S. 248, 252 (1991) (holding that a suspect may delimit the scope of a search for which he has consented); Id. Miller, 266 ("[I]t is undisputed that . . . consent may be limited or revoked.").

As the appellate court held in the instant case, sections 724.011(a) and 724.014(a) of the transportation code do not constitute the equivalent of voluntary consent as a recognized exception to the warrant requirement. Also See Forsyth v. State, 438 S.W.3d 216, 222 (Tex. App.—Eastland 2014, pet. ref'd) (holding that implied consent under the Transportation Code is not the equivalent to voluntary consent as a recognized exception

to the warrant requirement). As the appellate court furthermore concluded in the instant case, the State did not meet its burden to establish the reasonableness of drawing Ruiz's blood without a warrant pursuant to sections 724.011(a) and 724.014(a) of the transportation code. Also See Ford v. State, 158 SW 3d 488, 492 (Tex. Crim. App. 2005).

Regarding the state's argument that "consent, never withdrawn or limited, justified the blood draw," appellee argues that first, Ruiz never gave affirmative consent in the first place, since he was unconscious when he was initially found. Furthermore, consent which is affirmatively given is wholly different than tacit consent involving unconsciousness. This distinction is a problematic, poisoning thread running through all of the state's arguments. The consent one gives by virtue of driving on a public road is endemically tacit in nature. When followed by unconsciousness, this waters down the state's argument even further.

It is difficult to conceive of how tacit consent involving unconsciousness, as would have been the case here, could comply with the previously alluded to aspect of consent capable of being revoked. The two are simply not compatible. Furthermore, tacit consent involving a subsequently unconscious person, when it is unclear as to when unconsciousness began, spins an even more complicated and damaging web within the maze through which to navigate.

Regarding the state's assertion that there were no less intrusive tests that could have been performed on Ruiz to determine his blood alcohol content because of his unconsciousness, the problem here is, as the appellate court aptly noted in the instant case, the state never met its burden to demonstrate that the state's failure to procure a warrant was justified. Furthermore, the absence of any lesser intrusive tests alone do not justify bypassing the warrant requirement.

The issue of tacit consent involving unconsciousness versus affirmative consent is furthermore accentuated in Meekins v. State that the state cited stating that in Texas "a person's consent to search can be communicated to law enforcement in a variety of ways, including by words, action, or circumstantial evidence showing implied consent." Meekins v. State, 340 S.W.3d 454, 458 (Tex. Crim. App. 2011). It is difficult to see how, under the objectively reasonable person standard, implied consent involving unconsciousness could be supported under these facts.

Regarding the state's reference to the Arizona case of State v. Havatone, which stated that a blood draw from an unconscious individual is constitutional only when case-specific exigent circumstances prevent law enforcement officers from obtaining a warrant, it is worth yet again noting that the Court of Appeals in the instant case held that no exigent circumstances were present. State v. Havatone, 389 P.3d 1251, 1254-55 (Ariz. 2017).

Regarding the state's position that "it was Ruiz's own decisions and actions that rendered him incapable of withdrawing his consent," it would be a stretch to argue that Ruiz had the specific intent of intoxicating himself for the purpose of disabling his ability to withdraw consent later, which is the bramble bush into which this segment of the state's argument wanders.

Simply stated, it is unreasonable under the Fourth Amendment for an officer to rely on a driver's implied consent to a blood draw under the facts in the underlying case. Sections 724.011(a) and 724.014(a) of the Texas Transportation Code do not constitute the equivalent of voluntary consent as a recognized exception to the warrant requirement, and the state did not meet its burden to establish the reasonableness of drawing Ruiz's blood without a warrant pursuant to sections 724.011(a) and 724.014(a) of the transportation code.

CONCLUSION AND PRAYER

For the foregoing reasons, appellee respectfully requests that the Court of Appeals affirm the decision of the Court of Appeals.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of this brief was emailed to the Gonzales County District Attorney Keri Miller at kmiller@co.gonzales.tx.us and to the State's prosecuting attorney, Stacey Soule at information@spa.texas.gov on June 15, 2018 via email , and on same date was sent via regular mail to defendant Jose Ruiz, 2405 Church, #49, Gonzales, TX 78629.

Chris Iles

RULE 9.4 (I) CERTIFICATION

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the number of words in this brief, excluding those matters listed in Rule 94.(i)(1), is 3,033.

Chris Iles